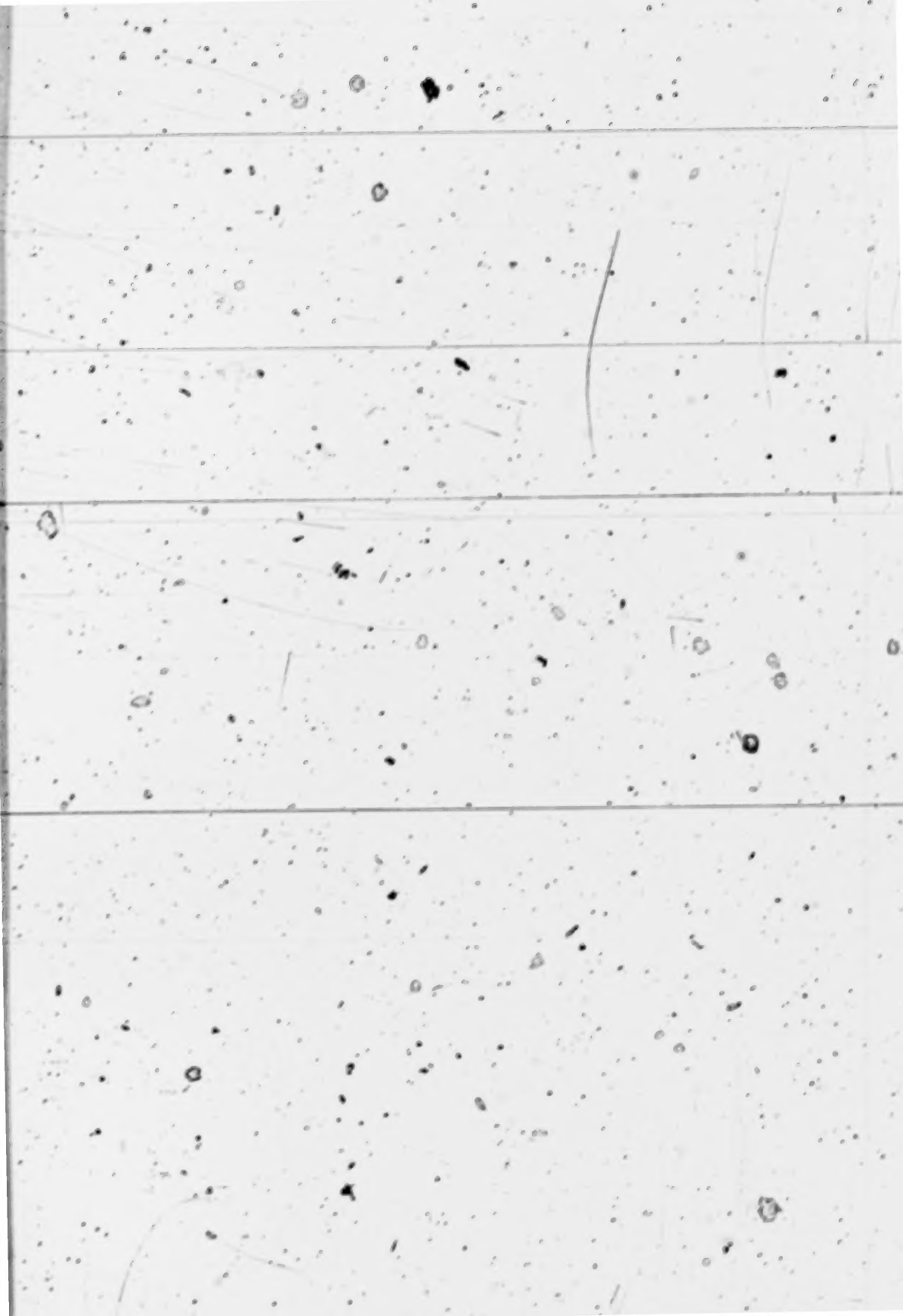

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No. 113

In the

Supreme Court of the United States

OCTOBER TERM, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Petitioners respectfully pray this Court to vacate its *per curiam* order of January 12, 1971, affirming the decision below by an equally divided vote; stay issuance of the mandate; and defer final disposition of this case until the full bench determines whether to approve, modify or reject the Rules of Evidence for the United States District Courts and Magistrates that are now pending before this Court.

A. The result in this case should be consistent with this Court's action upon the Rules of Evidence for the United States District Courts and Magistrates.

Subsequent to the decision in this case, the Judicial Conference of the United States recommended and transmitted the final draft of the Rules of Evidence to this Court. Rule 5-03, as approved by the Judicial Conference, contains the definition of the attorney-corporate client privilege that is identical to the control group test applied by the District Court in these proceedings.[1]

The Rules of Evidence, if adopted and transmitted to Congress,[2] should control the disposition of this case. This Court has frequently stressed the need to dispose of related cases consistently and to achieve uniformity in the application of the principles of law announced by this Court. *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957).[3] See *Gondeck* v. *Pan American World Airways*, 382 U.S. 25, 27 (1965). If this Court's inconclusive affirmance stands, the petitioners would be alone in their inability to secure access to information that is essential to a fair resolution of this litigation. Such

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[1] In the Proposed Rules of Evidence (March 1969), Rule 5-03(a)(1) includes corporations in its definition of a client, and Rule 5-03(a)(3) defines a representative of the client as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." 46 F.R.D. 161, at 249-257.

[2] 28 U.S.C. § 2072 requires that the Rules of Evidence be transmitted to Congress prior to May 1, 1971.

[3] Justice Harlan, dissenting in *Ohio Power*, conceded that perhaps even "out-of-time action may be justified in some instances where the time interval between a finally decided case and a subsequent contrary decision of this Court is short." 353 U.S. at 110.

a result would defeat the expressed purpose of the Rules of Evidence "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (Rule 1-02)

The control group test for defining the scope of the attorney-corporate client privilege has been drafted and recommended by a distinguished body of scholars and jurists.[4] Rule 5-03 finely balances the competing interests that have been expressed with respect to the existence of the privilege. Pursuant to 28 U.S.C. § 331, the Rules of Evidence have emerged from extensive, careful and impartial preparation and review.[5]

The Judicial Conference of the United States has reviewed and approved the final draft of the Rules of Evidence, adopting and strongly endorsing the control group test applied by the District Court. The Rules of Evidence now await consideration by all Justices of this Court.

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[4] See *Hanna* v. *Plumer*, 380 U.S. 460, 476 (1965), (Harlan, J., concurring).

[5] The Advisory Committee on the Rules of Evidence, appointed by the Chief Justice of the United States, spent three and a half years drafting the Proposed Rules of Evidence before submitting them to the Standing Committee on January 30, 1969. The Standing Committee thereupon requested and received comments from interested members of the bench and bar until April 1, 1970. In addition, the Proposed Rules of Evidence were discussed at the judicial conferences of each Circuit and the regional seminars attended by members of the Advisory Committee.

B. Resolution of the attorney-corporate client privilege issue would avoid confusion with respect to pretrial discovery in this case, as well as other pending anti-trust suits.

The need to resolve the uncertainty in the application of the attorney-corporate client privilege is especially compelling in view of the fact that the Seventh Circuit erroneously permitted defendants to secure interlocutory review by resort to mandamus. Since this litigation is still pending before the District Court, the enactment of Rule 5-03 will result in a reopening of pretrial discovery and renewal of the request for production of the grand jury debriefing statements. Once the Rules of Evidence have been enacted, "all laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. § 2072. Moreover, newly promulgated rules ordinarily "govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice. . . ."[6] Any potential dilemma with respect to whether the Rules of Evidence should govern additional discovery in the District Court may be avoided by withholding decision in this case until the full bench of this Court passes upon the Rules of Evidence.

This case raises fundamental and important issues to the administration of justice which "ought not to be left with the inconclusive determination" of an affirmance by an equally divided court. *Burns* v. *Wilson*, 346 U.S. 844 (1953) (Frankfurther, J., dissenting). If no action is taken

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[6] *E.g.*, 383 U.S. 1031 (1966 Amendments to Federal Rules of Civil Procedure).

upon the Rules of Evidence, there will remain a conflict among the Circuits with respect to the proper scope of the attorney-corporate client privilege. This confusion should be settled by adoption of the control group test. Note, "Attorney-Client Privilege for Corporation Clients: The Control Group Test," 84 *Harv. L. Rev*: 424, 435 (1970).[7]

C. If left undisturbed, the decision below will work injustice upon petitioners in this case and create an invitation to abuse of the mandamus remedy.

The record in this case presents compelling reasons to afford petitioners access to the grand jury debriefing statements. The debriefing statements already obtained by petitioners disclose that counsel and witnesses suppressed the truth before a federal grand jury and during depositions in these antitrust damage suits. Without repetition of the arguments against allowing defendants to conceal competent and vital evidence behind the claim of attorney-corporate client privilege, we submit that justice requires, at the least, that if this Court intends to promulgate the Rules of Evidence, Rule 5-03 should govern the pretrial discovery in this case.

Moreover, the Seventh Circuit's decision, which places virtually no restraints upon the issuance of writs of mandamus, will doubtless encourage resort to this extraordinary remedy. The use of mandamus by appellate courts to substitute their opinions on disputed questions of law will seriously disrupt trial court proceedings. Frequent mandamus petitions by defendants for interlocutory

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[7] There is pending on petition for certiorari a case that challenges the existence of an attorney-corporate client privilege. *Garner* v. *First American Life Insurance Co.*, No. 1161 (October Term, 1970).

review of pretrial rulings in large antitrust suits[8] threaten to undermine the efficient and fair administration of justice sought to be achieved by consolidation of discovery in multi-district cases under 28 U.S.C. § 1407.[9]

For the foregoing reasons, petitioners request that the *per curiam* order of January 12, 1971, be vacated, that issuance of the mandate be stayed, that the disposition of this case be deferred for reconsideration following this Court's decision to adopt, modify or reject the Rules of Evidence.

Respectfully submitted,

LEE A. FREEMAN
LEE A. FREEMAN, JR.
Attorneys for Petitioners

I certify that this petition for reconsideration is presented in good faith and not for delay.

/s/ Lee A. Freeman, Jr.

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[8] *E.g., Beecham Group Ltd.* v. *Sirica*, No. 24870 (D.C. Cir. 1970).

[9] Adoption of the Rules of Evidence would remove any conceivable justification for the issuance of a writ of mandamus by the Seventh Circuit.

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